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Possible future work in Public-Private Partnerships (PPPs)

Discussion paper — Part I

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I. Introduction

1. This Colloquium on possible future work in the area of PPPs is held pursuant to a suggestion of the United Nations Commission on International Trade Law (the Commission, or UNCITRAL) made at its forty-sixth session in 2013.[1] Its purpose is to make recommendations to the Commission on possible future work in PPPs for the next session. This paper is provided to the Colloquium to assist it in its deliberations.

A. Background

2. At its 2013 session, the Commission considered the report of an earlier Colloquium on possible future work in PPPs (the "2013 Colloquium").[2]

3. The 2013 Colloquium reported that neither the UNCITRAL texts on Privately-financed Infrastructure Projects (the "PFIPs Instruments"),[3] nor other international texts on PPPs could be taken as a "de facto standard or model available to States for PPPs reform". The Commission heard of the wide use of the PFIPs Instruments, and descriptions of developments in PPPs since they were issued, and concluded that PPPs would be amenable to harmonization and the consensual development of a legislative text. The Commission noted, however, that "the PFIPs Instruments might be in need of some updating and revision, given the development in the market for PPPs, and ... the key elements of a legislative text on PPPs — drawing in large part on the PFIPs Instruments — were agreed".[4]

4. However, the Commission considered that further preparatory work would be required in order to set the scope for any mandate to develop a legislative text to be given to a Working Group. In particular, the Commission noted:

(a) A wide variation in terminology, scope and contents of existing texts at the national level; and

(b) Some divergence of views as to whether a Model Law or other legislative text on PPPs should be developed.

5. A main issue for this Colloquium, therefore, is to clarify the scope of any mandate recommended for development of a future legislative text. This clarity is required in order to demonstrate to the Commission that work towards developing a legislative text on PPPs would be ready for submission to a Working Group.[5]

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[1] See Report of the Commission, A/68/17, para. 331.

[2] Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013), document A/CN.9/779: the conclusions are summarized in paras 73-85 (available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html). For reasons of space, this paper does not refer to specific paragraphs of the Report.

[3] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[4] Report of the Commission, supra, para. 329.

[5] Both the scope of a future text on PPPs and the policy issues for deliberation must be clear. The Commission is satisfied that PPPs are likely to be amenable to harmonization and the consensual development of a legislative text, that a legislative text on PPPs would enhance the

6. The Colloquium may wish to note that the Commission will not consider whether to grant such a mandate to a Working Group in isolation; all suggestions for planned and possible future legislative development will be considered together, in order to allow the Commission to decide on its priority items. The Colloquium may wish, therefore, to comment on the importance to UNCITRAL of work on PPPs. Some relevant considerations are set out in Part II of this Paper.

B. Studies and consultations between the 2013 Commission session and the date of this Colloquium

7. The Commission instructed the Secretariat to organize the preparatory work referred to above through studies, consultations with experts and a Colloquium. The preparatory work has followed the Commission's instruction to be inclusive and transparent and multilingual to the extent possible, and to take account of the experience in all regions, including both the public and private sector.[6] The results of these activities are presented below.

II. Recommendations to this Colloquium arising from consultations and studies since the 2013 Commission session

8. The reports of variations in existing PPPs legislation made to the 2013 Colloquium[7] were based on research and the experience of the participants. While there was broad agreement that this view was accurate, it was agreed in the early stages of the consultations that a systematic survey should be undertaken to provide further details of national PPPs laws. The recommendations as regards the scope of a legislative text on PPPs would then be sufficiently grounded in practice.

9. The Secretariat, volunteer experts and consultants have therefore conducted extensive surveys of existing PPPs laws to assess the extent to which existing laws reflect the main topics in the PFIPs Instruments. The surveys included reviews of PPPs laws and regulations at the national and sub-national level (both PPPs legislation and other relevant legislation), in 58 countries. The countries surveyed were selected to provide regional diversity, as well as diversity in levels of economic development and legal tradition. This review, which is considered to cover a considerable percentage of PPPs legislation worldwide, can therefore be considered representative.

10. It was reported to the 2013 Colloquium that the scope of the Model Legislative Provisions and Legislative Recommendations was narrower than the Legislative Guide.[8] The surveys therefore identified both existing PPPs legislation that included

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law of international trade, and that proposed work would not duplicate work undertaken by other law reform bodies. Ibid., paras. 328 and 329.

[6] Report of the Commission, supra, para. 330.

[7] See, for example, the 2013 Colloquium Discussion Paper, para. 13, document A/CN.9/782, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html, and the reports and documents cited.

[8] See Report to the Third Session of the Team of Specialists on Public-Private Partnerships, Simmons and Simmons, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013-papers.html.

items beyond the scope of the Model Legislative Provisions and Legislative Recommendations, and provisions that went beyond the scope of the PFIPs Instruments as a whole.

Table 1: List of countries surveyed

Albania	Egypt	Malaysia	Senegal
Angola	Fiji	Mauritius	Serbia
Argentina	France	Mexico	Singapore
Australia	Guinea	Mongolia	South Africa
Benin	Côte d'Ivoire	Morocco	Republic of Korea
Brazil	Jamaica	Mozambique	Spain
Bulgaria	Jordan	Niger	Sri Lanka
Burkina Faso	Kazakhstan	Nigeria	Tanzania
Cambodia	Kenya	Paraguay	Tunisia
Cameroon	Kosovo	Peru	Uganda
Central African Republic	Kyrgyzstan	Philippines	Viet Nam
Chile	Latvia	Poland	United States of America
Colombia	Lithuania	Puerto Rico	Zambia
Croatia	Macedonia	Romania	
Czech Republic	Malawi	Russian Federation	

11. The analysis for each country's PPPs law was at a three levels:

(a) Is the main topic included in the Legislative Guide reflected in the country law (Yes/No);

(b) Are the Legislative Recommendations associated with the topic met (Yes/Partially/No);

(c) Are the Model Legislative Provisions met (Yes/Partially/No)?

12. An additional question posed was whether the country laws contained provisions in addition to those included in the PFIPs Instruments.

13. The consultants will present their detailed findings at the Colloquium, and a summary appears below.

14. The consultants report that there is a relatively high degree of reflection of the main topics of the Legislative Guide among the country laws analysed. However, compliance is significantly lower as regards the Legislative Recommendations themselves.

15. The consultants also report that, in relation to the main topics contained in Sections I-VI of the Legislative Guide:

"(a) At a summary level, the main topics in Sections I-VI of the Legislative Guide were reflected in country laws 59 per cent of the time on average, ranging

from 79 per cent (Section I — General and institutional framework) to 33 per cent (Section VI — Settlement of disputes);

"(b) In relation to Section III — Selection of the Private Party and Section IV — Construction and operation: legislative framework and project agreement, which account for 66 per cent of the Legislative Recommendations, the main topics were reflected in the country laws on average 63 per cent and 66 per cent of the time respectively;

"(c) In relation the Legislative Recommendations, and where the main topics in the Section were reflected in the country law, on average 58 per cent met the associated Legislative Recommendations. A further 36 per cent partially met the associated Legislative Recommendations, with 6 per cent of the sample who included the main topics failing to meet the Legislative Recommendations;

"(d) Taking the sample of 58 countries as a whole:

"(i) 36 per cent on average met the Legislative Recommendations;

"(ii) 23 per cent partially met the Legislative Recommendations;

"(iii) 41 per cent failed to meet Legislative Recommendations;

"(e) 'In respect of Section III — Selection of the Private Party' and 'IV Construction and operation: legislative framework and project agreement', which account for 66 per cent of the Legislative Recommendations:

"(i) Section III, 33 per cent of the Legislative Recommendations were met and a further 27 per cent were partially met but 40 per cent of the sample did not fully meet the Legislative Recommendations;

"(ii) Section IV, 27 per cent of the Legislative Recommendations were met and a further 34 per cent were partially met but 38 per cent of the sample did not fully meet the Legislative Recommendations;

"(f) In respect of Section VI — Settlement of disputes, 25 per cent of the Legislative Recommendations were met and a further 7 per cent were partially met but 68 per cent of the sample did not fully meet the Legislative Recommendations."

16. The main topics for which the consultants report a higher level of non-compliance than compliance with the Legislative Recommendations are:

(a) General legislative and institutional framework: two-thirds of the countries surveyed did not reflect the Legislative Recommendations on the authority to regulate infrastructure services;

(b) Project risks and government support: over half of the countries surveyed reflected or partly reflected the Legislative Recommendations overall, but as regards guarantees provided by international financial institutions and export credit and investment promotion agencies, for which there is no Legislative Recommendation but there is guidance in the Legislative Guide, only 28 per cent included legal provisions in the national PPPs law;

(c) Selection of the private party (37 per cent of the total number of Legislative Recommendations): while the main provisions of the selection method in the Legislative Recommendations were met or partly reflected in a high proportion of the countries surveyed, a majority did not reflect the Legislative

Recommendations on the record of the selection and award proceedings and on review procedures. Furthermore, exactly half did not reflect the provisions of the Legislative Recommendations on award without PPPs procedures, and only 52 per cent met or partly met those on unsolicited proposals;

(d) Construction and operation: legislative framework and project agreement: a majority did not reflect the Legislative Recommendations on security interests, assignment, transfer of controlling interest in the project company and construction works;

(e) Duration, extension and termination of the project agreement: there was a high degree of compliance in this area, though 45 per cent of countries surveyed did not meet the Legislative Recommendations on consequences of expiry or termination of the project agreement;

(f) Settlement of disputes: This section was the most poorly reflected in the countries surveyed, particularly as regards disputes other than those between the contracting entity and the private party.

17. This pattern reported was also broadly evident in the reflection of the Model Legislative Provisions in country laws. Again, the lowest level of compliance was found as regards the settlement of disputes.

18. This topic had already been flagged as one requiring revision to the PFIPs Instruments, so the consultants also considered dispute settlement provisions separately, reviewing national laws in Kyrgyzstan, Egypt, Kenya and Mongolia, the fourteen national PLC (Practical Law Company) sections on review procedures and remedies,[9] the PPP Guidelines of Malaysia as well as the documents found relating to PPPs in Australia, India, Japan, the Russian Federation, Turkey and Morocco. The summary findings are as follows:

(a) The treatment of review procedures and remedies in the specific context of PPP contracts is limited, but the rules applicable to public procurement aspects of PPP generally apply. To this extent, the laws of the following 14 countries are broadly consistent with Review Procedures under Chapter III of the Legislative Guide: Brazil, Canada (in addition, arbitration may be agreed as the form of dispute resolution), China (normally procurement law does not apply to PPP or concessions), the Czech Republic, the United Kingdom of Great Britain and Northern Ireland, France, Germany, Italy, the Netherlands, Poland, South Africa, Switzerland, Ukraine and the United States of America; and

(b) These country laws do not address disputes between service providers, or other commercial disputes (disputes between project promoters and between the private party and its lenders, contractors and suppliers and disputes involving customers or users of the infrastructure facility).

19. The main topics reported by the consultants are provided for in country laws but that are either not found in the PFIPs Instruments, or are covered in less detail or in different ways from the treatment in those texts, largely confirm the findings of the 2013 Colloquium. The first finding was that, while the PFIPs Instruments are a sound basis for law reform in PPPs, certain aspects of the PFIPs Instruments are in need of some updating and revision. Examples include the provision of services,

[9] http://us.practicallaw.com/.

unsolicited proposals, some aspects of project risk and government support, some aspects of the selection procedure, some aspects of contract management and project operation, and dispute settlement mechanisms.

20. Secondly, there appears to be increased consensus on issues for which there was previously no accepted policy solution. Examples include governance and social responsibility, the avoidance of fraud and corruption, addressing conflicts of interest, and the interaction between PPPs and other laws.

21. Thirdly, the split between the various PFIPs Instruments, and the fact that some issues are covered in more than one location in the PFIPs Instruments, indicate that a re-presentation of the guidance and provisions would enhance their readability. Examples include references to other relevant laws and financial and investment issues.

22. Since the Commission session, the Secretariat has also engaged in consultations with experts and agencies working in PPPs reform, through exchanges of documents, teleconferences and in-person meetings, so as to complement the survey described above with the views of these experts and agencies.

23. The consultations as a whole identified a series of issues that warrant specific consideration as the key elements indicating a revision of the PFIPs text. The following section therefore considers each of the topics concerned.

III. Main issues for further work on PPPs

A. Scope of any future legislative text on PPPs

24. An initial issue addressed in the consultations was the scope of any future legislative text. The Legislative Guide contains options for the types of concessions to be regulated,[10] but none of the PFIPs Instruments addresses the scope of an enabling law per se.

25. This issue is more complex than may be immediately apparent, partly in that there is no universal definition of PPPs. At the 2013 Colloquium, it was noted that the historically more common type of PPP is an infrastructure project with accompanying private sector delivery of associated services to the public ("infrastructure plus service PPP"), in which the operator is paid under a concession mechanism. This is the focus of the PFIPs Instruments. As also reported, however, PPPs now include the development of non-tangible infrastructure with service provision, the private provision of public services without infrastructure development, and other contractual arrangements (partnering, alliancing, some institutional PPPs, long-term leases, leasing and management contracts).[11] The scope of services concerned now ranges from simple to complex: for example in health-sector PPPs, from clinical services to more common facilities, cleaning and catering services.

[10] See Chapter I, Section C.2, especially para. 19.

[11] See the Discussion Paper for the 2013 Colloquium, supra, paras. 11-12, 17-18, the reports and documents referred to therein, and the 2013 Colloquium report.

26. A further variant of PPPs arises where a private party provides what are generally considered to be public services but that have not previously been available. Here, the authorities may subsequently seek to regulate and cooperate in the provision of the services. Reported examples of such cases include water and waste management services in Francophone Africa, and health services as described above.

27. It has also been reported to the Secretariat that private finance in infrastructure development (without associated service provision) is increasing in countries such as France, Morocco, Qatar, Tunisia, Turkey and the United Arab Emirates.

28. The surveys unsurprisingly indicate that the legislative map is highly varied, both in form and scope. Some States have public procurement and concessions laws, but no law addressing other forms of PPP; others are reported to address several forms of PPP, the lease and sale of government assets and divestments in procurement laws, though privatizations are as a rule addressed through project-specific enabling legislation.

29. In addition, the scope of existing international texts on or that may have relevance for PPPs varies: the OECD Basic Elements[12] include natural resource concessions (excluded from the PFIPs Instruments). The consultants report that the laws of Kenya, Kosovo and Kyrgyzstan all exclude natural resource projects.

30. At the 2013 Colloquium, it was considered that UNCITRAL should consider new types of PPPs that are not within the current scope of the PFIPs Instruments. However, the majority of the experts consulted report that the overwhelming majority of PPPs for the most likely users of a legislative text — developing countries and those in transition — would be infrastructure plus service PPPs, and that perhaps 20 per cent of the issues arising in these projects pose 80 per cent of the problems identified as obstructing effective PPPs.

31. The key features of infrastructure plus service PPPs are the construction and operation of the infrastructure and the delivery of the associated public services by the private sector. These elements involve an emphasis on private service provision as well as private finance; this in turn implies a shift of emphasis in the PFIPs Instruments, which do not address service provision in detail.[13]

32. The notion of infrastructure plus service PPPs, however, leaves considerable areas of uncertainty. First, infrastructure projects without associated services could be covered in practice by referring only to the infrastructure-relevant sections. However, there are significant differences from the projects addressed in the PFIPs Instruments, which focus on project finance as the main financial mechanism. The private investment is reimbursed through the revenue stream arising under a concession framework for the operation of the infrastructure facility.[14] Without service provision, the reimbursement of the private investment must come from the

[12] Available at http://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements.

[13] See Chapter IV of the Legislative Guide, page 129, Recommendation 53, and Model Legislative Provision 28(h), for example.

[14] See, for example, Section II of the Legislative Guide, "Project risks and government support", pp. 37-59.

contracting authority, and not from users. This type of PPP is often termed "public payment PPP" or "PFI/PPP".[15] In addition, there may be mixed contracts.

33. If the Colloquium considers that some or all public payment PPPs should be included in a future legislative text, it may wish to indicate additional issues that may be involved. Examples include which law will govern these transactions — would they fall within the public procurement law?[16] Some contractual and other implications are addressed in the section below on Funding and investment issues, and in the section on Legislation vs. contract in Part II of this paper.

34. Infrastructure PPPs without service provision generally include natural resource and agriculture concessions are infrastructure projects (broadly defined). The 2013 Colloquium report indicated a preference for excluding such projects because they involve a wide range of issues, many of which would not be relevant beyond particular projects or these sectors, and as there is existing international guidance on, for example, oil and gas and mining.[17] The Colloquium may wish to address this question in its report.

35. Addressing infrastructure plus service PPPs could similarly accommodate public service projects without infrastructure development, to the extent that the infrastructure-relevant provisions are not applied in relevant projects. This approach therefore accommodates the recommendation from the 2013 Colloquium that the construction of physical infrastructure should not be considered as indispensable to a future text, and recent developments in the market. The reported increase in the scope of services in services projects — such as that described for the health sector above — may indicate, however that more complex contractual provisions are required, such as greater flexibility within the contract terms to deal with both changes and other issues emerging arising from various technological factors. The Colloquium may wish to report on additional issues that such PPPs would involve if it wishes to include them in the recommended scope of any future text.

36. A further type of PPP is an "institutional PPP", in which the project vehicle is a joint venture held between the contracting authority and a service provider. Examples provided to the Secretariat include institutional PPPs in the power and health sectors. Other new PPP structures include those in which the private party is in fact a State-owned enterprise. The Colloquium may wish to consider whether there are any additional provisions that would be required if such PPPs are to be included in a future legislative text on PPPs.

37. In summary, the consultations indicated that:

(a) The concept of PPPs should be kept flexible, leading to an umbrella concept that could be subdivided, rather than a strict definition of PPPs. The main relevant concepts identified would then operate as a description of PPPs;

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[15] The "PFI" generally refers to the UK Private Finance Initiative.

[16] See, further, paras. 41 and 79.

[17] See, for example, (a) the publications of the Extractive Industries Transparency Initiative (EITI) at http://eiti.org/. EITI is an international standard that ensures transparency around countries' natural resources, and is developed and overseen by a coalition of governments, companies, civil society, investors and international organizations; and (b) the Sector-specific toolkits of the World Bank available at http://ppp.worldbank.org/public-private-partnership/sector.

(b) A key element for additional regulation is the private provision of public services; and

(c) The need is for general principles that can be applied to regulate the common elements of all PPPs.

38. The consultations did not, however, reach a common position on the precise scope of the PPPs to be addressed. Here, the extent of work and likely appetite of UNCITRAL's member States for a PPPs project may be relevant. The 2013 Colloquium observed that UNCITRAL should engage in work that was feasible within a time-frame that would allow the project to meet what was considered to be "an urgent need for a more general UNCITRAL standard on PPPs".

39. In the light of this observation, the need to recommend a reasonably certain scope of work to the Commission, the tensions between trying to address all forms of PPPs and producing a text in a relatively short time-frame, the majority of the experts consulted recommended that UNCITRAL should focus its efforts on legislative development for infrastructure plus service PPPs. As a practical example of the type of choice that these resource-related issues implies, see, further, paragraphs 55-56 in the section on Cross-border PPPs, below.

40. The Colloquium may wish to set out in its report to the Commission the types of PPPs that are to be included in any future legislative text, those that are to be excluded, and those where a decision is not yet taken. It may also note that regulators of excluded forms of PPPs could draw on the core PPPs topics and guidance on them in a future UNCITRAL text (and UNCITRAL could in due course decide to address other forms of PPPs, as separate future topics).

41. A second and related issue of scope is the demarcation of public procurement, concessions and PPPs laws. The Commission has previously heard that infrastructure projects form a spectrum from public procurement, via PPPs, to privatization.[18] The expert consultations emphasized that clarity of scope is critical to allow for States to ensure that the law(s) applicable to each project is or are clear. Options could be to regulate all the procurement-related parts of such transactions under the public procurement law, and to enact separate laws regulating different types of projects from start to finish, with identical provisions as appropriate (e.g. as regards the planning, procurement and key service provision elements), to ensure consistency. An initial indication on this issue may assist the Commission in assessing the length and scope of any mandate to be given.

42. The Colloquium may also wish to elucidate in its report to the Commission that the initial activities in legislative development would be to map the main issues that are likely to be solvable through legislation for the PPPs concerned (including whichever of the variants above the Colloquium concludes should be addressed), based on the studies referred to above and relevant international instruments, for consideration by a Working Group. The policy solutions to these issues would draw from the research carried on to date and ongoing studies.

[18] Para. 32, 2013 Colloquium discussion paper. See, also, para. 79 of this paper on potentially overlapping laws.

B. Key topics for inclusion in a PPPs legislative text

43. As reported at the 2013 Colloquium, four main areas relevant for regulation of PPPs are the legal and regulatory environment; project planning, including the allocation of project risks and government and donor support; selection of the project partner (supplier or concessionaire); and the project agreement and project operation and management. These four areas are not precise demarcations between aspects of PPPs, but are grouped together for ease of reference and discussion in the current forum. (Should UNCITRAL take up the topic of PPPs, it may then consider it appropriate to address how best to put these areas together in a single legislative text.)

44. The following sections of this paper report on the main issues arising from the Colloquium that the expert consultations confirm should be revised or re-presented as compared with their treatment in the PFIPs Instruments as currently formulated, or that should be introduced into a PPPs legislative text as new topics. They are grouped into the four thematic areas referred to in the preceding paragraph. The consultations emphasize that these are the main issues, and are not intended to provide an exhaustive list of topics for revision.

45. Given the conclusions of the 2013 Colloquium and subsequent expert advice that the point of departure should be the PFIPs Instruments, the current treatment in the PFIPs Instruments is summarized where relevant, and recommendations are made regarding the extent to which the PFIPs Instruments should be revised and re-presented.

46. This section also highlights some further topics in the PFIPs Instruments in respect of which more minor revisions may be warranted.

1. The legal and regulatory environment

(i) Institutional framework

Relevant Legislative Recommendations: 1, 6-8

MLPs: No reference

Legislative Guide "Administrative coordination", Section D in Chapter I ("General legislative and institutional framework")

47. A robust institutional framework and related processes are well-recognized as vital to effective PPPs and to attracting investors in PPPs. The experts advise that not only are the issues concerned new to most countries, they are also substantially different in many aspects from traditional public procurement projects. They include designing the scope and evaluating the affordability of services, the use of land (perhaps involving expropriation, resettlement, etc.) and more complex contracts to reflect both the long-term nature of the project and financial and operational issues. Coordination between several ministries will be required; financial, tax and accounting aspects of most projects need to be assessed (such as contingent liabilities and other issues discussed in "Funding and investment", below); issues of public payment, subsidies, or State guarantees will necessitate at least coordination, and in most cases an endorsement from the Ministry in charge of the finance and/or budget.

48. An appropriate and comprehensive institutional framework to plan, design, develop and manage projects, drawing on international best practices is therefore required. There are many source materials recently published on this topic, but they remain incomplete;[19] for example, many focus on PPP planning and preparation, transparency, and to some extent procurement.[20]

49. PPPs Units, which are recommended in the Legislative Guide, have proven successful in some developed countries (e.g. in the United Kingdom, Australia and France, notably for PPP/PFI contracts and for projects at the national level). The results have been less positive in developing countries. As OECD notes, "The PPP Unit should enable authorities (e.g. line ministries) to create, manage and evaluate a PPP efficiently and effectively. This role requires that the PPP Unit have the requisite in-depth financial, legal, economic and project management skills."[21]

50. In addition, and particularly in emerging economies, an efficient PPP institutional framework goes much beyond the organization and the support of a central PPP Unit. Again, according to OECD, key institutional roles and responsibilities should be clarified to address fiscal and budgeting issues, procurement aspects, auditing of PPPs, and monitoring rules and enforcement.[22] A holistic approach to institutions is therefore required.

51. The institutions will need to reflect core principles of independence and transparency in organization and governance; the experts advise that these have not been sufficiently addressed in existing legislation, and so should be reflected in any future legislative text on PPPs.

52. The experts therefore suggest revisions to the Legislative Guide to take account of developments in PPPs institutions, and that the scope of the Legislative Recommendations and Model Legislative Provisions should be expanded. Further details of these issues, and commentary on the implications of the consultants' finding that the recommendations on the authority to regulate infrastructure services are not generally followed in country laws, will be provided at the Colloquium.

(ii) Cross-border PPPs

No references in the PFIPs Instruments

53. Cross-border projects (CBPPPs) have been in existence for as long as infrastructure or service projects. However, when the PFIP Instruments were prepared, little attention was given to the questions that CBPPPs raise, so the topic is not addressed in those Instruments. The consultants also report that there is no CBPPPs enabling provision in the countries surveyed. In times of globalization, increased regional cooperation, and technical development, cooperative

[19] See the PPIAF "Reference Guide on PPPs, 2012, available at http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/WBIPPIAFPPPReferenceGuidev11.0.pdf.

[20] See for instance: PPIAF Note No. 4 "Developing a PPP framework: policies on PPP unit" (May 2012), available at www.ppiaf.org/site./ppiaf.org/files/documents/Note-Four-Developing-a-PPP-Framework.pdf.

[21] OECD "Principles for the public governance of Public-Private Partnerships", available at www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm, section 2.

[22] Ibid.

arrangements across national borders will substantially increase in numbers. Various studies point at the significant specific positive effects of CBPPPs: in short, CBPPPs increase the level of trade, trade openness, and support broader economic growth. Examples of CBPPPs can already be found across all continents and across all areas ranging from infrastructure to tourism and space projects. Another main reason for initiating CBPPPs is the fact that some challenges cannot be tackled alone by a single country (for example financing would otherwise not be possible).

54. Although the very positive effects of CBPPPs are widely acknowledged, a wide-spread reluctance to launch CBPPPs can be noted. The most significant obstacle to CBPPPs reported is the lack of guidance to address appropriately the specific legal problems inherent to CBPPPs, which is seen as a major obstacle to unleash their acknowledged great positive potential. The experts suggest that UNCITRAL, as an international platform, would be best suited for remedying this lack of guidance. UNICITRAL could also address the legal aspects related to CBPPPs in an appropriate manner, and the experts report that experience with the PFIPs Instruments also shows that CBPPPs should be addressed in any future PPPs text.

55. The experts suggest three options how such provisions on CBPPPs might be included:

(a) First the issue could be dealt with by creating a new legal regime ("regime X") on the international level establishing new and additional regulations/provisions. These provisions should provide sufficient detail while at the same time guaranteeing the necessary flexibility and adaptability, be aligned with other existing international instruments (including UNCITRAL's other instruments) and be coordinated with international organizations such as UNCTAD, WTO and OECD. This option would entail extensive preparatory and drafting efforts;

(b) The second option would be the development of special provisions on certain necessary basic aspects of CBPPPs combined with the introduction of guidance on how to use, adopt and adapt existing provisions already in force to the international context and aspects. UNCITRAL would therefore in essence limit itself to giving guidance on the considerations to be made when adopting the relevant provisions for CBPPPs. However, as already pointed out, also this option would need drafting efforts (regarding the necessary legal preconditions when implementing this option, especially on how to create a kind of collision and remedy regime);

(c) The third option would be a combination of option 1 ("regime X") with option 2. As a consequence of this option a decision would have to be made as to which areas would be fully (new) regulated on the international level and in which areas a reference to existing legal regimes would be implemented.

56. Noting the vast range of considerations and legal areas involved with CBPPPs, UNCITRAL's scarce resources, and criteria for future work and modus operandi, the experts advise that the implementation of the first and third policy option are too burdensome and resource intensive. The decision-process on which areas should be (newly) regulated and which not in policy option three might prove very lengthy and arduous. Therefore, the experts recommend policy option two.

(iii) Governance and social responsibility

No references in the PFIPs Instruments

57. The Rio +20 declaration called on "the private sector to engage in responsible business practices, such as those promoted by the United Nations Global Compact".[23] Corporate governance principles coalesce around the idea of ensuring stronger transparency and accountability in the corporate sphere. There is a clear public interest in ensuring appropriate corporate standards of behaviour (some competitive tactics, normal in the private sector, will not be appropriate in PPPs), but how far this notion extends is not certain.

58. As PPPs are a collaboration between the public and private sectors, a proper balance between corporate governance and equivalent public standards on accountability and transparency obligations is required. For example, how should the need for due diligence be addressed, given that the project company is responsible not just to shareholders, but to a wider group of stakeholders, and has ongoing obligations of public service delivery? Due diligence in public procurement operates under well-understood rules, but the PPPs situation is more complex and less well-addressed. Also, which private sector entities are to be covered?

59. The long duration of the relationships between the partners (often multiple and changing) and the particularities related to risk distribution also require clear and adequate governance frameworks at all stages of a PPP project (decision-making, procurement, operation, termination). There may need to be rules on changes in the corporate structure to avoid the risk of all obligations being left in empty shell companies, to ensure a legal entity that will be responsible for all the obligations for the entire length of the project, and rules on equity sales may be required (construction companies, for example, will not generally wish to remain long-term shareholders). As the private partner usually has a complex organizational structure with various subsidiaries, associated or joint venture companies, the experts advise that it is equally important to make sure that any requirements applicable to the main contractor are also applied to these entities, and broader rules on subcontracting are needed.

60. Although PFIPs Instruments touch upon some of the issues linked to establishing clear rights of shareholders and stakeholders (creditors, employees, customers) or the organization, functions and responsibilities of boards of directors (collectively and individually), these matters need to be further explained and complemented. There is a need to protect the public authority's interest in ongoing service delivery (for which a range of widely-different tools may be available, raising complex policy issues). Future work should address potential controversies in preventing and addressing corruption, conflicts of interest, the independence of board members, directors, executives and auditors and establishment of code of conducts promoting high standard ethical behaviour. Accountability and responsible decision-making indicate improved oversight mechanisms (such as committees, units, audit and other authorities), internal control systems over boards and audits of financial statements.

[23] Para. 46, the future we want.

61. The questions of standards on accurate and periodic disclosure of information and sufficient transparency in financial reporting and accounting relevant to governance are addressed in the section on Transparency in Part II of this paper.

62. Finally, the international community has also been increasingly involved in promoting new core values applicable to any business environment and encompassing human rights, environmental protection, long-term sustainability, anti-corruption measures, board's risk management and oversight, relationship with management and accountability to shareholders. OECD has also developed 12 principles, focused around 3 objectives, which may provide a starting-point for provisions:

(a) Establish a clear, predictable and legitimate institutional framework supported by competent and well-resourced authorities;

(b) Ground the selection of PPPs in value for money; and

(c) Use the budgetary process transparently to minimize fiscal risks and ensure the integrity of the procurement process.

63. The experts recommend that the necessary requirements could be imposed through the legislative framework and/or through contractual or other mechanisms, and some consider that these should not exceed requirements on other corporations in relevant sectors to protect ongoing participation in the market. The Colloquium may wish to consider how to scope a relevant recommendation to the Commission.

(iv) Funding and investment issues

Relevant Legislative Recommendation 13, "Government support"

MLPs: None

Legislative Guide: Section B.4 "Financing structures and sources of finance for infrastructure", in "Introduction and background information on PFIPs"; Section A, "General remarks", and Section C, "Government support", in Chapter II, "Project risks and government support"

64. The PFIPs Instruments focus on the notion of project finance (that is, non-recourse lending in the sense that the investment in the project is recouped from its assets and revenue, not the lenders). However, as the Legislative Guide notes, additional security and credit are often required, including government support, so the funding is in reality limited recourse. Common sources of debt and equity financing are described in the Guide. The experts have reported an increase in initial financing from construction companies and other forms of private finance, such as pension funds. Some of the investments are designed to be short term; others, long term.

65. Assessing the fiscal sustainability of the project requires an analysis, inter alia, of the following issues:

(a) Is the potential PPP project of a scale to justify the transaction costs?

(b) Will the investment be repaid by the contracting authority, end users, or a mixture?

(c) If end-user charges are levied, will demand be sufficient over the lifetime of the project?

66. The answer to the first of these questions, in addition to its relevance to whether a project should be conducted as a procurement or PPP, has raised many issues in practice. Existing PPP models have received considerable criticism for excessive transaction costs, which distort this question. They include high consortia fees and high tender costs exacerbated by lengthy selection processes, and windfall profits. Equity financing is also reported sometimes to be more expensive than debt financing, but it may have other benefits, such as if there is broad equity participation over the longer term.

67. Various Governments are promoting solutions designed to address these issues through enhancing long-term equity investment, details of which will be presented to the Colloquium. They are considered to involve tailored governance solutions (such as a legislative framework defining organizational structures, transparency, assurance, and reporting processes, rather than relying on contractual provisions); the possibility of government guarantees for rates of return to pension fund investors; and periodic fund management re-competition during the investment period.

68. In Australia, one proposed solution is a two-phase "inverted" procurement process for PPP: there is a first competitive process for equity funding to determine market appetite and set threshold rates of return, prior to the business case and procurement phase. A similar process could be set for debt financing.

69. However, it has been reported that pension funds and similar funds may not be able to invest in projects unless the project's social/economic goals are declared and can be monitored.[24] In addition, without reforms to procurement processes, enhanced transparency throughout the project, and improved contract management and governance in the operation phase (discussed elsewhere in this section), they may not be willing to invest.

70. The Colloquium may wish to consider the extent to which any future legislative text on PPPs should address these issues, including as a separate topic or as part of other relevant topics.

(v) PPPs with small-scale operators

No references in the PFIPs Instruments

71. The projects for water and waste management services in Francophone Africa referred to in paragraph 26 above were concluded with small private operators. Such projects were historically considered to be outside the PPPs environment. However, as public authorities have started to organize and regulate these services in cooperation with such operators, the position has changed. As many such PPPs operate in urban situations, the services concerned can be paid through concessions — the example of Morocco was cited to the Secretariat.

[24] As regards goals and objectives, see the section on Sustainable Development issues; disclosure and confidentiality issues are addressed in the section on Transparency, both found in Part II of this paper.

72. There are benefits of such PPPs to development goals — local employment and the creation of a local private market, providing public access to essential services (waste and water collection, transport, sanitation and electricity, for example). In public procurement, policies designed to support SMEs are common (ranging from process simplification to financial support). Projects with small private operators can also operate as capacity-building tools.

73. The Colloquium may wish to consider which, if any, of such projects should fall within the PPPs that UNCITRAL may address, from a policy perspective. For example, publicly-funded projects can evidently be simpler SME-support tools than those under concessions, because the funding is relatively secure, and arises under long-term contracts.

74. If these projects are to be addressed, a secondary issue is whether the regulations (e.g. selection procedures) should be relaxed to encourage small private operators. The experts' views differed on this question.

75. Other relevant issues include how to define relevant operators, ensure equity investment in those operators, design appropriate payment systems, develop capacity through regulation and/or guidance, provide appropriate institutional support, and how to allow for changes during the project period that may have a very significant impact on smaller operators.

76. The Colloquium may care to note that the Conseil d'État of France, the Agence Française de Développement and the World Bank are leading a community of practice in PPPs with small private operators. Further information on such PPPs will be provided to the Colloquium.

(vi) Consistency between PPPs and other laws

Relevant Legislative Recommendations/MLPs: None

Legislative Guide: Section B.1(a), "Competition Policy and Monopolies", in "Introduction and background on PFIPs", and Chapter VII, "Other relevant areas of law"

77. The importance of ensuring that the legislative framework adequately addresses other relevant laws was noted at the 2013 Colloquium. The current Legislative Guide addresses competition law and policy, and a range of other relevant laws from national laws on the promotion and protection of investment to anti-corruption measures, and relevant international agreements. The experts have advised that existing guidance requires updating, and some revision, building on the current Legislative Guide, on such matters as promotion and protection of investment (including developments in case law, business risk and perceptions); competition law; licensing law; data protection and information disclosure law (see, also, the section on Transparency in the second part of this paper). Additionally, developments in constitutional issues -- such as the extent to which a project agreement should be uplifted to the status of legislation and so would override prior inconsistent laws — and in case law[25] are cited as requiring review.

[25] The Experts referred to cases at ICSID (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) and the many cases relating to the Eurotunnel project.

78. The Colloquium report stressed that not all such issues are capable of legal resolution, and that a future legislative text should focus on legislative solutions.

79. The Colloquium may wish to consider how to provide appropriate guidance to support any future legislative text. For example, the Guide to Enactment accompanying the Model Law on Public Procurement sets out other relevant laws to assist in the implementation and use of the Model Law;[26] UNCITRAL has also published a paper on procurement regulations, which explains how the Model Law may be supplemented by such regulations.[27] In the PPPs context, an equivalent approach could draw attention to potentially overlapping laws to avoid conflicts (existing procurement and/or concessions laws; privatization laws, the laws referred to in the existing Legislative Guide, and sector-specific regulation).[28]

80. The Commission may also wish to consider two related topics, arising out of the United Nations Convention Against Corruption (UNCAC),[29] which the experts advise are out-of-date in the PFIPs Instruments.

(a) Anti-corruption and integrity measures

Relevant Legislative Recommendations/MLPs: None

Legislative Guide: "Promotion of the integrity of and confidence in the selection process", "Transparency of laws and procedures", Items 2(b) and (c) in Chapter III. (in "General objectives of the selection process"; "Anti-corruption measures", Item B.14 in Chapter VII (in "Other relevant areas of law")

81. UNCAC came into force after the issue of the PFIPs Instruments and so was not taken into account when the latter were drafted. It contains provisions relevant to PPPs in article 9 ("Public procurement and management of public finances") and article 12 ("Private Sector").

82. The Legislative Guide notes the importance of integrity measures and appropriate rules for government contracts, outlines some key elements, and refers the reader to international texts pre-dating UNCAC as sources for relevant provisions. At the 2013 Colloquium, it was noted that more emphasis was needed on transparency and accountability measures throughout the project, public disclosure of resource transfer from the public to the private sector and vice versa, and on media for communications and meetings.

83. The 2013 Colloquium noted that the Model Law on Public Procurement was drafted specifically to comply with UNCAC, and underscored the importance of consistency between the Model Law and any future PPP text as regards integrity measures.

84. The UNCAC requirements for the management of public finances include procedures for the adoption of the national budget; timely reporting on revenue and expenditure; accounting, auditing and oversight; risk management and internal

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[26] Para. 61, in Section C, "Implementation and use of the Model Law ...".

[27] Document A/CN.9/770, available at http://uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[28] See, also, para. 41 on potentially overlapping laws.

[29] United Nations, *Treaty Series*, vol. 2349. Also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

control systems; and measures to preserve the integrity of relevant documentation. These requirements, set out in the Technical Guide to UNCAC regarding article 9,[30] are supplemented by requirements in article 10 for public reporting and transparency (access to information concerning public administration and periodic public reporting) and in article 12 for measures to prevent corruption involving the private sector, referring specifically to PPPs and corporate governance.

85. OECD has issued a series of relevant publications that can assist in crafting relevant standards. The Principles for the Public Governance of PPPs referred to above set out the need for a clear, predictable, legitimate and appropriately resourced institutional framework — involving public awareness through consultations of the relative costs, benefits and risks of PPPs and public procurement; the need to maintain key institutional roles and responsibilities (to ensure prudent procurement process and clear lines of accountability); and the need for regulation to be clear, transparent, enforced and not excessive. They also discuss the need for a transparent budgetary process to minimize fiscal risks and ensure integrity of the procurement process in PPPs, with disclosure of all costs and contingent liabilities and the need to ensure the integrity of the procurement process, and refer to other OECD reference tools.[31]

86. The Colloquium may therefore be of the view that the PFIPs Instruments require revision to comply with prevailing international standards, drawing on the above texts.

(b) Conflicts of interest

Relevant Legislative Recommendations/MLPs: None

Legislative Guide: "Institutional Mechanisms", Item E.2 in Chapter I (in "Authority to regulate infrastructure Services") (paras. 37, 38 and 47); "Choice of subcontractors", Item 1(a) in Chapter IV (in "General contractual arrangements") (para. 101); "Company law", Item B.8 in Chapter VII (in "Other relevant areas of law") (para. 32)

87. Related to the preceding topic is that of conflicts of interest. PPPs are often complex: many stakeholders, complex financing schemes, different traditions and usages, long-term duration, the public nature of the services provided by the project, and disputes of varying and complex nature.

88. Such projects involve a multitude of parties and public entities: the Government or a public authority, a concessionaire or contracting private party, a legal entity established by the private side with separate legal personality (a special purpose vehicle — "SPV"), sponsors, lenders — institutional and others — capital markets, advisers, insurers, an operator, contractors, suppliers, users, and supervising authorities.

89. The structure of PPPs has an inherent potential for conflicts of interest. PPPs typically involve the same parties in various capacities. The sponsors are typically owners of the project and often also contractors or suppliers to the project. The

[30] Available at www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

[31] See, further, a discussion handout for the preparation of the Principles — available at www.oecd.org/gov/budgeting/48144872.pdf.

primary interest of the sponsors as contractors or suppliers are in most cases to build the infrastructure of the project or to provide goods or services to the project. In their capacity as sponsors, they will control the SPV and its contractors and suppliers, which could entail a preference for the position of the contractors or suppliers. Typically, directors and managers of the SPV are employees of the sponsors and subordinate to officers of the sponsors. When the Government becomes part of the group of owners, its interest is the public interests and not primarily the interests of the SPV, and the representatives of the Government involved in the management of the SPV have the role of safeguarding the interest of the Government. Also, the Government may have many other roles: tax collector, regulator, project supervisor, financier, service provider, owner of assets needed for the project and of competing providers of goods and services, etc. Also financiers will have a controlling role which in project finance structures is very strong, in particular over project cash flows.

90. Many situations will arise where the interest of the various participants collide. Such cases of conflicts may arise regarding the use of cash flow and profits, when there are disputes between or among project participants, regarding quality of the construction, goods or services, etc.

91. It seems as if the problems connected to conflicts of interest have attracted little attention, maybe because they are not understood or that some participants are inclined to benefit from this. These problems have only sporadically been addressed in the Legislative Guide on Privately Financed Infrastructure Projects and not at all in the Legislative Provisions. In addition to a brief reference to the issues relating to the sponsors of the SPV set out above, the Legislative Guide simply recommends provisions on conflicts of interest for staff of regulatory agencies and for staff of the contracting authority during the selection process, and that contractors disclose potential subcontractors to identify possible conflicts.

92. It is therefore proposed that conflicts of interest should be included in work to develop a future legislative text on PPPs, drawing on (among other things) the requirements for Codes of Conduct under Article 8 of UNCAC, the requirements under Article 9(1)(e) of that Convention for measures to regulate personnel responsible for procurement, and the reflection of those provisions in article 26 of the UNCITRAL Model Law on Public Procurement and accompanying Guide to Enactment, and possibly on provisions dealing with conflicts of interest in the concession award procedures in a proposed directive on concessions in the European Union. These measures may include declarations of interest, screening procedures and training requirements, and contractual arrangements.

[*This paper continues in document A/CN.9/820*]

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Possible future work in Public-Private Partnerships

Discussion paper — Part II

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III. Main issues for further work on PPPs (*continued*)

B. Key topics for inclusion in a PPPs legislative text (*continued*)

2. Project planning, including the allocation of risk and government support

(i) Project planning and preparation

Relevant Legislative Recommendations, MLPs: none

Legislative Guide: Section D.1, "Co-ordination of preparatory measures", in Chapter I, "General Legislative and Institutional Framework"

1. The PFIPs Instruments provide general guidance on project planning and preparation, outlining important elements of good practice and emphasising in particular the importance of feasibility studies. The guidance stresses that the latter should include "economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility and the environmental impact of the project".[1]

2. The experts advise that these provisions are, however, insufficient, given the evidence of unacceptable rates of failure in PPPs in developing countries (estimated to exceed 50 per cent after only 2 years of project operation). They note that the costs of effective planning and preparation are not adequately accounted for in government budgets and many countries do not evaluate such costs prior to commencing a project. They add that an estimated US$ 1 billion is needed for annual preparation costs for all World Bank PPPs in Africa, of which most should be applied towards feasibility studies, but in practice under US$ 50 million is spent on such studies. Moreover, the expenditure is applied in an uneven manner, without coordination among the many sectors involved. The situation is reported to be compounded by poor governance and vested interests. Practitioners cite the lack of an appropriate framework for project planning and project preparation as one of major weaknesses of PPP institutional frameworks (addressed in Part I of this paper) and PPP laws generally. Hence the experts consider that a more detailed and prescriptive approach is needed in any future legislative text on PPPs.

3. The experts also advise that savings from avoiding project failure would far outweigh the costs of good planning and preparation, and that the experience of the international financial institutions and practitioners in planning and preparation policies at the national and international levels could be harmonized and aggregated to a large extent. Lessons learned from this experience and that of related working groups[2] could help formalize good practices applicable to all forms of PPPs and to all parties to them, and standards and guidance that could be applied widely.

4. The planning and preparation steps that could be addressed include: (1) Development of a (medium-term) master plan for infrastructure development, including the provision of public services; (2) Consequential prioritization of

[1] Legislative Guide, para. 25, Section D.1, "Co-ordination of preparatory measures", in Chapter I, "General Legislative and Institutional Framework".

[2] Such as the Public-Private Infrastructure Advisory Facility (PPIAF), www.ppiaf.org/.

projects based on socioeconomic objectives and considerations, financial implications, effects on sustainable development, and so on; (3) Plans for each project, to address choice of project type, based on financial and other capacity of a State or a contracting authority (traditional procurement, Design & Build, PFI/PPP, concession-type PPP); (4) Planned market assessments for each project; and (5) Evaluation by various actors of individual projects in accordance with established standards, including transparency requirements, reflecting the type of project concerned.

5. It was also suggested that plans should be published so that whether the desired socioeconomic outcomes are realized and whether the financial assessments underlying the choice of project type prove accurate can be evaluated in a transparent manner. These issues are also discussed in the sections on Transparency and Other issues, below.

6. The experts also note that more recent PPPs laws include provisions on selection, prioritization and development of projects, though there is some anecdotal evidence that these provisions are sometimes seen as a barrier to developing projects (and so contracting agencies may seek to circumvent them and to engage in non-competitive selection procedures). In addition, the importance of an infrastructure plan as noted above may assist in addressing some aspects of unsolicited proposals, as further explored in the section on that topic, below.

7. The experts advise that the recommendations in the Legislative Guide on ensuring that the relevant bodies are adequately-resourced and enabled to coordinate as appropriate on due diligence matters and financial preparation should also serve as a basis for further provision in any future legislative text on PPPs. The scope and functions of relevant institutions discussed in Part I of this paper will be a relevant consideration in this context.

(ii) Risk allocation

Relevant Legislative Recommendation 12

MLPs: none

Legislative Guide: Section B, "Project risks and risk allocation", in Chapter II, "Project risks and government support"

8. The 2013 Colloquium heard suggestions that the question of risk allocation should be afforded greater detail in any future text on PPPs, that there was too little flexibility on the topic so far as the private sector is concerned in many PPPs laws,[3] and that the Legislative Guide provides inadequate guidance on some aspects of the topic.

9. The Legislative Guide describes the various categories of project risk affecting the various parties to and stakeholders in the project, and recommends as a general principle that the party most able to prevent a risk from occurring, to bear its costs or consequences and/or to take mitigating steps should bear and manage the risk. This principle is broadly followed in other international texts on PPPs (and in the OECD Principles for the public governance of PPPs referred to above).

[3] See, also, section 3.5.1 of the Simmons and Simmons report, footnote 8 in Part I of this Discussion Paper, A/CN.9/819.

10. The experts suggest that certain risks — such as demand risk and public affordability risk — cannot easily be identified, defined and measured, and that the parties to a PPP may characterize some risks differently. The Legislative Guide also notes that some risks are endogenous to one party to a PPP only, and some are in no party's control and so cannot be managed by any party (i.e., exogenous to all parties). Hence, special arrangements for them need to be addressed in the project agreement. An example of these exogenous risks, noted by the OECD, is an uninsurable force majeure risk, such as the risk of conflict.

11. The negotiation of the project agreement and related documents will therefore be a critical factor to ensure the appropriate allocation of risk, especially where risks are difficult to define, etc., and where there are disagreements over their characterization. Risk valuation is complex, and the price paid for risk transfer in these cases will be particularly difficult to agree (and it may be a key determinant of whether a PPP eventually gives value for money). The experts suggest that stricter requirements for more thorough feasibility studies and other project planning issues may assist in better identification, definition and measurement of risks, would ease the negotiation process and therefore should be required in any future legislative text on PPPs. In addition, they recommend a more articulate link between feasibility studies and risk assessment.

12. The experts also recommend that Legislative Recommendation 12 (on risk allocation) be considered specifically when addressing the balance of contract terms in legislation and contracts (discussed in the section on this topic below), and that methods of apportionment of risks that materialize should be included in contract terms. From a public policy perspective, it is suggested that guidance should be more robust on the negative implications for the public interest where risks are in theory transferred to the private sector, though an unstated assumption that they may ultimately be borne by the contracting authority. This situation may arise if some consequences, such as service interruption, cannot be permitted to materialize in practice.

13. It has also been noted that the public sector can in some cases self-insure against risk through pooling risks that may arise in its widespread operations. In such cases, explicitly identifying and paying for specific risks may be regarded as contrary to the public interest.[4] The experts suggest that the issues in this and the preceding paragraph require further development in any future text, drawing on the various sources identified.

14. Government guarantees and other forms of support to mitigate risks (e.g. compensating those affected when a risk arises, stabilization clauses) are discussed in the Legislative Guide, together with certain policy considerations. Here, too, the experts suggest that further elaboration is required in any future text on PPPs, considering, for example, whether support should be provided in respect of risks affecting the project specifically and whether such support should not be permitted to cover risks affecting the economy as a whole. Again, they recommend that the provisions and guidance should be expressly linked to project planning.

[4] See "PPP – A Decision-maker's Guide", Michael Burnett, EIPA, 2001, page 57.

3. Selection of the project partner

(i) Selection procedures

Relevant Legislative Recommendations: 18-39

MLPs: 5-27

Legislative Guide: Chapter III, "Selection of the concessionaire"

15. The 2013 Colloquium heard that the main steps in the selection of the project operator are pre-selection, participation of consortia, methods and techniques (single-stage, two-stage, single-source, negotiations); comparison and evaluation of proposals; contract award notices; and record-keeping. These steps are conducted under fairness, transparency and competition as guiding principles; and are subject to review or challenge (this aspect is discussed in the following section). These steps and principles reflect the requirements of UNCAC.

16. It has been acknowledged that traditional tendering procedures are generally not appropriate for PPPs. The 2013 Colloquium also heard that the UNCITRAL Model Law on Public Procurement included what is in essence an updated and complete form of the selection procedure in the PFIPs Instruments. The method concerned is called Request for Proposals with Dialogue, and it is available for the procurement of complex items and services (such as infrastructure projects).

17. Each of the PFIPs Instruments contains detailed provisions on the selection procedure, and the Colloquium may consider that the provisions concerned should be consolidated for the ease of the reader, in addition to being updated to reflect the provisions on Request for Proposals with Dialogue method in the Model Law on Public Procurement.

18. This method envisages a two-step process, designed to allow for innovative solutions to technical issues, to encourage sustainable procurement, and to provide for infrastructure needs. It allows for different technical solutions to be proposed, and for interaction between the parties on technical, legal and financial issues. However, it does not address all procurement-related issues that may be relevant to PPPs projects. Key additional issues revolve around the need to define, secure and evaluate the provision of services as well as to contract for construction, how to allow for value for money assessments involving performance measurement over the project lifetime, how to accommodate the interest of stakeholders in service provision, and to address more complex negotiations than arise in public procurement — among a broader group of parties to the project, including lenders.

19. At the more detailed level, some obligations that are relatively flexible for public procurement may require further elaboration in any future legislative text on PPPs. They include the extent of disclosure of the proposed procurement contract at the solicitation stage and the need to finalize the project agreement after selection of the project operator (negotiations on the procurement contract are prohibited in the Model Law, but are contemplated in the Legislative Guide and MLP 17). The experts advise that these issues will need to be addressed in conjunction with a consideration of the contents of the project agreement (as to which, see the section on Provision in legislation or contract, below), and the extent to which amendments to contracts and step-in arrangements for the project may imply reopening competition or may involve other aspects of the procurement process. The solutions

designed to allow for transparency throughout the project discussed in the sections on Procurement Planning and Preparation above and on Transparency below may also need to be brought into the picture, such as the public declaration of the goals and objectives of the project (including stakeholder benefits), so as to allow for accountability for delivery of services as well as physical construction.

20. The 2013 Colloquium agreed that any future text on PPPs should be based on the above procurement method, so as to ensure consistency in procedures and safeguards in projects whether publicly- or privately-funded. The Colloquium may wish to include in its report to the Commission its views on this topic.

(ii) Domestic preferences

Relevant Legislative Recommendation/MLPs: none

Legislative Guide: Section B.4, "Pre-selection and domestic preferences", in Chapter III, "Selection of the concessionaire"

21. The Legislative Guide provides outline guidance on domestic preferences, noting that although many States seek to use them, such preferences give rise to many policy issues. In addition, the Legislative Guide notes that their use may be constrained by international commitments of the enacting State, and refers to the provisions in the 1994 UNCITRAL Model Law on public procurement and accompanying commentary on margins of preference. The experts note that the main reasons governments seek to use domestic preferences are to pursue their socioeconomic policy objectives, and more generally to support development goals (the link between those goals and PPPs is discussed further below, in the section on the Importance of possible future work on PPPs). In addition, domestic preferences may be an important tool for supporting PPPs with small private operators, discussed in Part I of this paper.

22. The current (2011) Model Law on Public Procurement and Guide to Enactment contain provisions on and extensive discussion of preferences and other tools that States may use to pursue these socioeconomic policy goals. Flexibility to use the tools is given to the extent that international obligations, such as those arising under the WTO Agreement on Government Procurement permit and when procuring using loans from international donors. The measures include robust transparency mechanisms, designed to ensure that potential participants in the process will understand how the goals will be implemented in the procedure, which may be in any of four stages: when deciding to limit a procurement to domestic suppliers, and when examining qualification, responsiveness and evaluating tenders. The provisions are also designed to enable States to implement sustainable procurement, using the practical tools developed by other donor agencies (such as the United Nations Environment Programme, the OECD, and others) and to allow for any mandatory requirements imposed in an individual State (such as regards environmental criteria).

23. The Colloquium may consider that any future legislative text on PPPs should follow this approach, though noting that its application in the PPPs environment is considerably more complicated than is the case in public procurement. For example, applying a domestic preference to predominantly non-price evaluation criteria and service provision is extremely difficult. In addition, the experts advise that amplified guidance will be required in the PPPs context, given the public service

obligations and their implications for all phases of the project cycle, and that it should provide clear examples such as how to use social clauses and other measures promoting social responsibility and pro-poor projects.

(iii) Review and challenge mechanisms

Relevant Legislative Recommendation: 39

MLPs: 27

Legislative Guide: Section I, "Review procedures", in Chapter III, "Selection of the concessionaire"

24. The PFIPs Instruments contain outline recommendations on review and challenge mechanisms, i.e. disputes arising out of the selection process in PPPs (separate to post-award disputes, which are addressed in the section on that topic below). Such mechanisms were noted at the 2013 Colloquium as examples of areas of PPPs regulation that would be suitable for harmonization with public procurement laws, being equally applicable in the public procurement and PPPs contexts.

25. The Model Law on Public Procurement contains a chapter with comprehensive provisions on review and challenges, implementing the core principles set out in the PFIPs Instruments. They allow three types of challenges (challenges presented to the procuring entity, and/or to an independent body and/or to the judicial authorities). The chapter also provides remedies available to aggrieved suppliers.

26. The provisions are drafted flexibly, so need to be tailored to suit the enacting State's legal system, as explained in the accompanying Guide to Enactment. They are sufficiently broad to allow investors and other parties to a PPP to use the mechanisms concerned. The chapter was designed to implement the requirements of UNCAC on review and appeals mechanisms, including a requirement for an appeal against first-instance challenge decisions.

27. The Colloquium may therefore consider that a provision allowing parties to a PPP to avail themselves of the procurement challenge mechanism should be included in any future PPPs text.

(iv) Unsolicited proposals

References: Leg Recs: Recommendations 30-35

MLPs: Provisions 20-23

Guide: Chapter III, Section E: "Unsolicited proposals", paras. 97-117

28. The experts advise that unsolicited proposals are controversial issues in most countries and that there are few examples in the last decade of projects having been satisfactorily developed as a result of unsolicited proposals.

29. They also note that, in infrastructure plus service PPPs, the scope for taking up unsolicited proposals should be limited by reference to the current guidance in the PFIPs Instruments. In summary, those provisions — which the experts consider as representing best practice — state that unsolicited proposals claiming to involve the use of new concepts or technologies may be taken up, but those claiming to address an unidentified infrastructure need should not. The reasons justifying the latter

exclusion include that the contracting authority would be unable to assess whether its needs would be met appropriately, and that the affordability of other projects included in an investment plan may be compromised (see, also, the section above on Project planning and preparation).

30. The experts note that the mere fact that an unsolicited proposal may be in the public interest (i.e., it meets a previously unidentified need) is not sufficient to permit direct negotiations without competition. They further advise that additional provision is required to address whether unsolicited proposals could ever be acceptable without any form of competition.

31. The PFIPs Instruments also provide that where the subject of an unsolicited proposal is considered to be a project in the public interest, but is not proposing new concepts or technologies, or is not protected by intellectual property or similar rights, it may proceed with the caveat that the contracting authority should initiate the normal competitive selection procedures. Here, however, recent experience indicates that a proposal that falls outside a government's infrastructure plan and consequential budgeting arrangements should not generally be considered in the public interest: special circumstances would need to exist before it may be further considered.

32. In addition, the experts agree with the Legislative Guide's recommendations that the normal selection procedures may require some modification in cases in which the proposals contain new concepts or technologies. For example, the contracting authority may publish a description of the essential output elements of the proposal, seeking competing proposals. The experts add that this procedure could include dialogue (in the sense of the procurement method described in the section on Selection procedures above), including some provision for a premium to be paid to the original proponent if it is selected. The experts note that this process is not simple, even given existing guidance on the operation of this approach,[5] and that the current provisions require some strengthening.

33. If an unsolicited proposal involves exclusive intellectual property rights, the current provisions allow the authority to negotiate directly with the proponent, though a general recommendation to seek to introduce competition, to the extent possible, is made. The experts note that, if the proposal is for a PFI/PPP, procurement laws on the procedure may apply, though they would normally permit direct negotiations (potential overlaps between procurement and PPPs laws are discussed in Part I of this paper). The experts add that further detail is required on this type of unsolicited proposal.

34. The experts conclude that, after a decade of experience, the provisions of the PFIPs Instruments overall on this topic have proven to be fair and robust. They do not recommend any fundamental amendments, but a consolidation and some strengthening of the provisions in the three instruments, updating them as necessary to reflect developments in practice. In addition to the issues mentioned above, these developments include further procedures on identifying whether a proposal is in the public interest and is "unique" in the sense of proposing new concepts or

[5] See, for example, the "Competitive Dialogue Charter, IGD January 2007, available at www.fondation-igd.org/files/pdf/The%20Competitive%20Dialogue%20Charter%20%204.pdf, and Chapter V in the Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

technologies, including institutional checks and balances. As regards procedures for handling unsolicited proposals, issues such as Swiss challenges, allowing the original proponent a bid premium, reimbursement of the costs of developing the original proposal (or funding the original proponent to conduct a selection procedure) may also be addressed in any future text.

4. The project agreement and operation

(i) *Provision in legislation or contract*

Main relevant Legislative Recommendations: 12, 40

MLPs: Provision 28

Legislative Guide: Section A, "General provisions of the project agreement", in Chapter IV, "Construction and operation of infrastructure: legislative framework and the project agreement"

35. Legal certainty is recognized as a prerequisite for securing investment in PPPs. The PFIPs Instruments set out suggested contents of the project agreement, and note that the extent to which contents of the agreement are prescribed by law varies among States. Points in favour of legislative provision include consistency and reducing the scope and length of negotiations, and those in favour of contractual provision include flexibility in negotiations.

36. The experts differ on where the appropriate balance between these approaches may be. However, they agree that legal systems generally view freedom of contract as both critical for commercial transactions and in need of limitation to protect the weaker party to those transactions and the public interest. Such limitations have been in place for many decades. Examples include limitation of liability clauses by a defaulting party, consumer protection (an expanding area of law in Europe, for example, and one that may include protecting the end user of a public service), limitations on privatization and on full property rights through compulsory purchase schemes. Such provisions are found in common and civil law systems, whether or not contract law is codified, and whether or not there is a separate body of law governing public-private contractual agreements.

37. It is generally recognized that prescriptive underlying legal principles, established in advance and disseminated to all players, and key principles for contract interpretation are essential for the success of most PPPs.[6] The long-term nature of PPPs requires contractual provision on issues ranging from the right of the contracting authority to amend the contract terms or to terminate the contract, to the provision of compensation for exceptional economic circumstances and mandatory exceptional procedures if the public service is disrupted. The main characteristics of

[6] See, e.g., "A new approach to public private partnerships", HM Treasury, United Kingdom, December 2012; available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf. "Infrastructure productivity: How to save $1 trillion a year", McKinsey Global Institute, January 2013, available at www.mckinsey.com/insights/engineering_construction/infrastructure_productivity, which stresses the important potential for pension funds to finance public infrastructure projects and PPPs if appropriate legal framework and good practices are in place.

a public service and its scope are sometimes a major issue (examples: tariff setting, non-discrimination, continuity, adaptation).

38. On the other hand, the risk of unnecessary contractual restriction is acknowledged, though it is tempered with the notion that parties to PPPs must always be able to justify that their agreement is able to meet the interest of society and the public interest at large. Such a notion is sometime referred to as a "social licence to operate" (for example, in the mining industry).[7]

39. Proposed solutions therefore vary, in part reflecting the different considerations in concession-type PPPs and PFI/PPPs. In concession-type PPPs, poor experience in developing countries in particular indicates that there are no easy and simple negotiations: many terms, essential for the long term success of the venture, also conflict with the contract law and with the legal culture of the contracting authority. In PFI/PPPs, on the other hand, the financial aspects of the project indicate that there is less need for a large range of prescriptive or interpretative public contract law provisions for the long-term success of those projects, though only to the extent that the investment climate and investment protection regulations meet certain standards.

40. The experts advise that the PFIPs Instruments contain many elements that could form the basis of legislative provisions on contractual terms: examples include Legislative Recommendations and MLPs on obligations of the concessionaire, duration and extension of the contract, compensation for changes in legislation, amendments to the contract, termination by the contracting authority, on collection and revisions of tariffs, handling and transferring assets, transfers of controlling interests and so on. Although additional provisions would be required, there is sufficient material from the PFIPs Instruments and practice to identify principles of more or less universal nature for the success of PPPs, representing a very substantial proportion of all contractual rights and obligations in any sustainable PPP agreement.

(ii) Post-award disputes[8]

References: Legislative Recommendations 69-71

MLPs: Provisions 49, 50 and 51

Legislative Guide: Item E.6, "Recourse against decisions of the regulatory agency", in chapter I, "General Legislative and Institutional Framework"; Chapter VI: Settlement of Disputes

41. The question of dispute resolution was noted as an issue by the Commission in 2012, and the Commission also heard a recommendation UNCITRAL should develop a national system for dispute prevention and settlement, building on the provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The Commission noted that further work on dispute resolution should follow

[7] See, for example, "Conflict and Coexistence in the Extractive Industries", Chatham House, November 2013, available at www.chathamhouse.org/publications/papers/view/195670.

[8] For disputes arising in the pre-award period, see the section on Review and challenge mechanisms.

the suggestions made at the 2007 UNCITRAL congress entitled "Modern Law for Global Commerce" (Vienna, 9-12 July 2007).[9]

42. Key recommendations made at that Congress included the development of local capacity to handle PPP disputes, and the development of a model law to include dispute resolution and preventive mechanisms. Prevention of disputes would also be supported by providing an opportunity to investors to comment on the development of rules and regulations that were applicable to them.

43. The PFIPs Instruments recommend that disputes between the contracting authority and concessionaire be settled in the project agreement; that a mechanism be established to address customers' and users' complaints, and that the concessionaire and other parties to a project should be free to choose their dispute settlement mechanism.

44. At the Congress, it was noted that the above recommendations and the guidance in the Legislative Guide are insufficient to address the many kinds of disputes that can arise in PPPs. The structure of PPPs set out in the Section on Conflicts of interest in Part I of this paper leads to a multiplicity of legal agreements, many of which are interrelated: from project agreements, shareholding/sponsor agreements, to various loan agreements, agreements relating to the design, construction and operation of a facility, consortium and subcontracting agreements and so on.

45. The 2013 Colloquium report also noted that the PFIPs Instruments were not sufficient to address these different clusters of agreements in a PPP. It emphasized that the resultant complexity of legal relationships provides significant potential for disputes, which can flow from one agreement to another. Examples of disputes that were considered not to be adequately addressed in PFIPs Instruments include regulator-operator disputes, and those between the SPV, its contractors and subcontractors (e.g. on design and construction elements). Such disputes could arise, in the post-award period, relating to the conclusion of project agreement and related agreements; the construction phase; the operation phase; and termination of the project.

46. The PFIPs Instruments were also considered as inadequately addressing the complexity of resolution mechanisms for disputes in PPPs: they do not emphasize adequately the crucial role of the governing law (and the choice of law during project formation), arbitration rules and dispute resolution forum, and their interaction.

47. The 2013 Colloquium, noting suboptimal outcomes in international arbitration, also urged a better balance in treating international arbitration and domestic dispute resolution. Multiple investment treaties, multiple international arbitration forums, cases and rulings and the poor enforcement of international arbitral awards were noted as key concerns. Building local capacity for local dispute resolution, it was stated, should be a focus in the PFIPs instruments. At the Congress, and subsequently, experts have advised the Secretariat that the increase in some forms of arbitration involving Governments should be reflected in a legislative text on PPPs; noting, however, concerns that some States prohibit arbitration involving the State

[9] See the Proceedings of the Congress, chapter V; available from www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

as a sovereign entity, and the relationship between any PPPs mechanism and investment regulation would need to be taken into account.

48. At the Congress, it was suggested that legislation for a "sound national regime for the prevention and resolution of disputes between regulator and operator" was needed. Although the essence of such a regime would build on the PFIPs Instruments, it was considered that the Legislative Guide focused on the mechanics of dispute resolution in an "abstract" way, and that the role of regulation in dispute prevention and resolution was underplayed.

49. Subsequently, and taking account of the above points, the suggestion has been expanded to state that such a regime for all elements of PPPs is required. Particular areas to this end, raised at the 2013 Colloquium, include: (a) Ensuring the necessary experience, skills and expertise of the judiciary to address complex issues in PPPs; (b) Addressing inefficiencies in court systems; (c) Addressing lack of independence; (d) Providing for effective accessibility (procedures may discriminate against foreign investors as opposed to national entities); and (e) Ensuring effective domestic enforcement of international decisions. The need for a settlement mechanism was referred to at the Congress and included as a relevant issue during the expert consultations prior to this forum. The Colloquium may consider that lessons from those States that have set up special fora to hear disputes should be taken into account (such experience being reported to the Secretariat as, at best, mixed).

50. A related aim of such a regime would be to avoid conflicting decisions and other issues arising out of parallel and concurrent disputes, so decisions by the body envisaged would need to bind all relevant parties and hence all interested parties should be able to participate. Conflicts of interest arising during proceedings, given the multiplicity of parties, would need to be addressed; ensuring independence in appointments to, the operation of, and appropriate standards of conduct within the entity likewise.

51. The Congress heard that model legislative provisions and/or legislative guidance should be considered by UNCITRAL to address these issues; the Colloquium may wish to consider those aspects that could be included in any future legislative text on PPPs.

5. Other topics

(i) Transparency

References: Legislative Recommendation 1

MLPs: Provision 1

Legislative Guide: Item A, "Introduction", in "Introduction and background information on privately-financed infrastructure projects"; Item B.1(a), "Transparency", Item D.2, "Arrangements for facilitating the issuance of licences and permits", Item E.5, "Regulatory process and procedures", all in Chapter I, "General Legislative and institutional framework"; Chapter III, "Selection of the concessionaire"; Item B, "Organization of the concessionaire", Item G, "Transfer of controlling interest in the project company", Item J.1(a), "Choice of sub-contractors", all in Chapter IV, "Construction and operation of infrastructure ..."; Item C, "Extension of the project agreement" and item D, "Termination", in

Chapter V, "Duration, extension and termination of the project agreement"; item B.9, "Tax law", and item 14, "Anti-corruption measures" in Chapter VII, "Other relevant areas of law"

52. The 2013 Colloquium noted the importance of ensuring transparency throughout PPP projects, and not just in the selection process. An example given was of the need for transparency in the transfer of resources from the public sector to the project operator during the operation period. This Colloquium may wish to note that the work of UNCITRAL on transparency in investor-State disputes contains discussions relevant to this topic. The UNCITRAL Rules on this topic are founded on the importance of transparency to good governance, a predictable regulatory framework and the importance of these elements in encouraging investment and hence sustainable development, the right of public access to information,[10] and the link to rules and procedures in public procurement and public financial management (as envisaged under UNCAC).

53. It has been acknowledged that although the PFIPs Instruments emphasize the general importance of transparency in the legislative framework, in regulatory and administrative processes and decisions, in the selection process (including as regards the treatment of unsolicited proposals), and in the operation of infrastructure, other references to transparency focus on a description of relevant provisions found in some national systems. Examples of the latter include transparency in project accounts, in administrative decisions on equity transfers, in any rules governing the choice of subcontractors and on extension of the concession period. Indeed, the only reference to transparency in the Legislative Recommendations and MLPs is in Recommendation 1, providing that the constitutional, legislative and institutional framework should ensure transparency (among other objectives).

54. The importance of transparency as a tool to ensure accountability and good governance has long been recognized and implemented in international texts on public procurement and PPPs. As noted above, it is a cornerstone principle of UNCAC. In the PPPs context, transparency is also critical for encouraging private participation in projects. The OECD principles referred to above state that the PPPs system "should ensure public awareness of the relative costs, benefits and risks of [PPPs], [and should include] active consultation and engagement with stakeholders as well as involving end-users in defining the project and subsequently in monitoring service quality".[11]

55. It has therefore been suggested that any future legislative text on PPPs should include more robust transparency provisions in all the above areas, in terms of model provisions rather than guidance alone. Transparency requirements in selection procedures can draw on work in public procurement and the current provisions in the PFIPs Instruments. As regards the planning stage of PPPs, public scrutiny of the decisions underpinning infrastructure plans and decisions on individual projects has been urged. For example, and as compared with traditional procurement, the "off-the-books" nature of some liabilities in PPPs has been stated to discourage responsible decision-making as regards fiscal sustainability and have

[10] A right recognized in international tribunals, such as in Claude Reyes v Chile (2006) (Inter-American Ct HR); Társaság V Hungary (2009) (ECtHR).

[11] Principle 1, OECD Principles for the public governance of PPPs, supra.

negative implications for future borrowing and investment abilities. The IMF has recommended disclosure requirements on financial aspects of PPPs;[12] it is suggested that this type of approach can support better decisions on fiscal matters.

56. Clarity as regards the socioeconomic and developmental goals being pursued through a PPP can assist in measuring whether or not those goals are met: also, as payments to the project operator are likely to be based on defined performance outcomes, transparency of the outcomes concerned is clearly needed for an objective evaluation of performance. The consultations prior to this Colloquium also emphasized that any future PPPs legislative text should consider the extent to which project agreements should be published as an aid to accountability. Issues surrounding contractual governance in a country have been cited as challenging in this context, as are necessary exemptions from disclosure. The discussions in UNCITRAL on exceptions to disclosure for commercial and other public interest reasons in the investor-State context may also provide useful parameters for assessing when information should not be disclosed in the PPPs context. In practical terms, also, commentators refer to the need to avoid what has been termed blanket publication of "zombie data",[13] which can in fact undermine accountability.

57. At the 2013 Colloquium, it was also suggested that UNCITRAL should encourage good governance by establishing a global transparency registry that would track operators' records, to be available for governments to consult when assessing potential partners.

58. The Colloquium may therefore wish to set out key aspects of transparency that it recommends should be included in any future legislative text on PPPs.

(ii) Other issues

59. Other topics that the experts indicate may require less significant revision in the PFIPs Instruments include the authority to engage in PPPs, insolvency and security interests following the issue of UNCITRAL texts on these topics,[14] and accounting and financial issues relating to fiscal sustainability, such as disclosure of PPPs and their contingent liabilities in government balance sheets (including rules to assist in the difficult task of assessing risk for this purpose).

6. Conclusions as to elements to be included in any new legislative text on PPPs

60. The 2013 Colloquium and consultations since the 2013 Commission session have indicated that the experts broadly agree on the main recommended topics for revision in PFIPs Instruments.

61. The Colloquium may therefore wish to assess and report on the scope of work required for those topics and others it considers relevant. It may also wish to provide an indication of the likely extent and time frame for a work programme to

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[12] See PPPs, Government Guarantees and Fiscal Risk, IMF, 2006, available at www.imf.org/External/Pubs/NFT/2006/ppp/eng/ppp.pdf.

[13] Referred to in "Public-Private Partnerships (PPPs) in International Development: Are we asking the right questions?", CAFOD, 2013, available at www.cafod.org.uk/curation/search?SearchText=ppps.

[14] See the post-2003 texts available at www.uncitral.org/uncitral/uncitral_texts/insolvency.html and www.uncitral.org/uncitral/en/uncitral_texts/security.html.

develop a legislative text including the topics concerned, and allowing for additional aspects to emerge. In its report, the Colloquium may also consider it appropriate to set out the assumptions upon which these conclusions are based, as well as relevant contingencies.

62. In addition, and noting the preliminary nature of the research and studies carried out to date, the Colloquium may consider that its recommendations should emphasize that any mandate given should be sufficiently flexible to allow a legislative text to be developed without further or repeated referrals to the Commission to amend the mandate as issues are developed.

C. Nature of any legislative text to be recommended

63. At the 2013 Colloquium, the prevailing view was that the desired legislative solution for any future work on PPPs would be a Model Law, because it would provide a relatively easy-to-use framework for legislators and would encourage a good level of predictability and security in the legal framework (reducing susceptibility to political change where PPPs are regulated through guidance only, for example). Noting that not all issues are susceptible to legislative solution, that Colloquium encouraged UNCITRAL to be clear about the aspects of PPPs suitable for a Model Law and those to be addressed in accompanying guidance or other forms of regulation. In addition, the Colloquium noted that the benefits of a Model Law include that it provides a flexible, non-prescriptive text, with best practice upon which there is international consensus, covering all essential provisions for (in this case) the types of PPPs regulated. Such a Model Law would identify minimum requirements for each project (that is, those for which a legislative solution is appropriate) and which provisions are required but should be drafted on a project-by-project basis. In addition, the Colloquium emphasized that an accompanying Guide to Enactment would be critical to provide for the effective implementation and use of the Model Law, but also to explain options and possible deviations from the text.

64. The alternative view, updating the Legislative Guide rather than drafting a Model Law, also received some support at the Colloquium. Reasons for so doing included historical political resistance to UNCITRAL's engaging in areas beyond its core competence (such as institutions in enacting States), concerns about the complexity of the subject, and the need to preserve significant flexibility. Here, it was noted that the analytical guidance that a Legislative Guide could provide would assist in identifying and overcoming obstacles to effective PPPs.

65. The form of a desirable legislative text on PPPs was therefore an important element of the consultations prior to this Colloquium. While the majority of experts continue to recommend a Model Law and accompanying Guide to Enactment, the following concerns have been raised about seeking to produce a Model Law. They can be separated into concerns about model laws generally, and PPP-specific concerns.

66. The main concerns raised about model laws generally revolve around the difficulty of tailoring them to suit local circumstances, without compromising their usefulness and, on the other hand, the temptation to copy a model law into local law without such tailoring. Although these issues appear diametrically opposed, they

both raise questions of transferability: does the legal, social, economic, cultural and political context render the use of a model law ineffective? The Colloquium may wish to consider UNCITRAL's experience in promoting and supporting the use of model laws in various subjects in considering this question, such as the recent experience in issuing much more comprehensive Guides to Enactment of UNCITRAL's more recent Model Laws

67. On the question of institutions in an Enacting State, UNCITRAL's recent experience in insolvency, public procurement and secured transactions,[15] as well as the consultations prior to this Colloquium, indicate that domestic institutions, previously considered politically sensitive and possibly outside UNCITRAL's core areas of competence are now accepted as part of UNCITRAL's remit.

68. On the question of PPP-specific concerns, the following issues were raised:

That the selection process, if based in traditional procurement procedures, would be insufficiently flexible for a PPP. Here, the Colloquium may wish to consider both the comments made at the 2013 Colloquium on this question, and the issues set out in the section on Selection procedures, above;

That modern PPPs laws include provisions on the prioritization and development of projects and other aspects of planning, which would be difficult to incorporate in a Model Law on PPPs. Again, the Colloquium may wish to consider the issues set out above, in the section on Project planning and preparation, above;

That combining general concern about "cutting and pasting" into a Model Law and the need to take account of a wide range of other relevant laws in PPPs would risk an incoherent and ineffective legislative framework. Here, the Colloquium may wish to separate the laws that would be relevant to all large infrastructure projects, and those arising in the PPPs context. The former must be taken into account in public procurement and are therefore addressed in UNCITRAL's work on that topic (including in the Guide to Enactment to the Model Law on Public Procurement), and have not previously been subject to the same concern. The latter may include constitutional law, privatization laws, corporate law, secured interests law, insolvency law, changes in legislation, and issues arising out of long-term contracts (e.g. variations in contractual terms), and financial and investment issues. Many of these issues are addressed in the current Legislative Guide as noted in the section on Other relevant laws above, and the Colloquium may consider that they would remain issues of guidance rather than for a Model Law. If so, the question becomes whether these topics are so significant that a Model Law would cover an insufficient area of PPPs to be effective.

69. The report of the 2013 Colloquium also noted the non-binding nature of model laws, legislative guides and guides to enactment, and concluded that updating the Legislative Guide alone would not provide the easy-to-use framework referred to above.

70. This Colloquium may wish therefore to consider this question anew: the lack of consensus on the type of legislative text recommended is one of the issues that

[15] See, also, 2013 Colloquium Discussion Paper, supra, para. 35.

the Commission relied upon when instructing the Secretariat to engage in further preparatory work before the Commission would decide on the referral of PPPs as a topic to a Working Group.

D. Importance of possible future work on PPPs

71. The Commission agreed with the conclusion of the 2013 Colloquium that PPPs have become an important tool "in securing resources for infrastructure and other development, at the international and regional levels and for States at all stages of development".[16] The Commission's sentiments echo statements from heads of State and Government and high level representatives made at the United Nations Conference on Sustainable Development in 2012 (the "Rio +20 Summit"), acknowledging "that the implementation of sustainable development will depend on active engagement of both the public and private sectors" and recognizing "that the active participation of the private sector can contribute to the achievement of sustainable development, including through the important tool of public-private partnerships".[17] The Rio + 20 declaration:

> Stated that "we reaffirm that international trade is an engine for development and sustained economic growth, and also reaffirm the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development, as they advance towards sustainable development. In this context, we remain focused on achieving progress in addressing a set of important issues, such as, inter alia, trade distorting subsidies and trade in environmental goods and services";[18] and
>
> Declared support for "national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives taking into account the importance of corporate social responsibility."[19]

72. At the Commission session in 2013, delegations emphasized that promoting sustainable economic and social development and the rule of law were important when assessing the priority to be ascribed to topics.[20] As noted above, the importance of PPPs in enabling pro-poor projects and social responsibility, as well as more general sustainable development issues, were emphasized at the 2013 Colloquium.

73. As noted in Part I of this paper, the Commission will consider whether or not to grant a mandate for legislative development in PPPs not only on the basis of the technical merits of a recommendation to this end, but also by reference to other work recommended. At the last two Commission sessions, in 2012 and 2013, it has noted the following points regarding prioritization of topics:

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[16] Report of 46th session, document A/68/17, para. 36.

[17] Para. 46 of "The future we want", adopted in Rio de Janeiro on June 22, 2012 at the Rio+20 Summit, G.A. Res. 66/288, available at www.un.org/en/sustainablefuture/.

[18] Ibid., para. 281.

[19] Ibid., para. 46.

[20] Report of 46th session, supra, para. 297.

The importance of identifying potential users of a text if developed;

The need to articulate the importance of the development of a text and of UNCITRAL's undertaking the work within the United Nations context;

The desirability of a strategic approach to responding to global events, developments in technology, and changes in commercial trends (citing examples of various means of engaging private capital for satisfying public needs, for example through public-private partnerships and private sector provision of State services, financial contracts and consumer insolvency);

The need to specify the priority that States attach to that work;

The need to quantify the economic impact or necessity of that work;

Avoiding the creation of de facto permanent Working Groups;

Allowing for the flexibility UNCITRAL needs to preserve to adapt to newly emerging priorities; and

Examining the work of other organizations that might be relevant to topics under consideration for future work by the Commission.[21]

74. At its session in 2013, the Commission emphasised that "the extent to which an envisaged legislative text would support the development of international trade law as expressed in the mandate given to UNCITRAL by the General Assembly should be the main factor guiding the Commission in deciding whether or not to take up a topic."[22] Applying its general considerations to future work, the Commission stressed in the context of issuing a mandate to Working Group I the importance of addressing "legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies" (see, further, the sections on PPPs with small private operators in Part I of this paper, and on Domestic preferences, above.[23]

75. The Colloquium may wish to assist the Commission in its deliberations by setting out relevant factual considerations pertaining to these issues in its report.

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[21] See the following documents for the Commission's 45th session in 2012: "A strategic direction for UNCITRAL", document A/CN.9/752, paras. 19-22, available at www.uncitral.org/uncitral/commission/sessions/45th.html and A/CN.9/752/Add.1, para. 24 (available at the same location), which noted "the role and relevance of UNCITRAL both within the United Nations and in the field of international trade and commerce. UNCITRAL's role and relevance can be assessed by reference to the work and priorities of the United Nations, donor communities and priorities of national governments. Key developments, such as the Paris Declaration on Aid Effectiveness (2005), and major international issues of concern — anti-corruption agenda, 2008 global financial meltdown, conflict/post-conflict situations — will shape the priorities of these bodies". See, also, section IV.B ("Prioritization of subject areas") in "Planned and possible future work", a document for the 46th session in 2013, document A/CN.9/774, available at www.uncitral.org/uncitral/commission/sessions/46th.html.

[22] Report of 46th session, supra, para. 297.

[23] Ibid., para. 321.